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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WINIFRED JIAU,
Plaintiff,
v.
RANDY L. TEWS,
Defendant.

Case No. [13-cv-04231-YGR](#) (PR)

**ORDER REVIEWING THIRD
AMENDED COMPLAINT; AND
DENYING DEFENDANT'S MOTION
TO DISMISS WITHOUT PREJUDICE
TO FILING A MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION

This action originally was filed by Winifred Jiau, a former federal prisoner, as a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Plaintiff, who at the time she filed the instant action was an inmate in the custody of the Federal Bureau of Prisons (“BOP”) at the Federal Corrections Institute in Dublin, California (“FCI-Dublin”), alleged that she was unlawfully denied her request for transfer to a Residential Re-entry Center (“RRC”)¹ on December 3, 2012. The Court notes that Plaintiff was eventually placed in an RRC around a year later, on December 23, 2013. Dkt. 48 at 10. She has since been released from BOP custody, as of June 2014. *Id.* at 1.

In an Order dated August 15, 2017, the instant action was converted into a *pro se* action under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Dkt. 38. Plaintiff’s has been granted leave to proceed *in forma pauperis*. Dkt. 39. The Court found that Plaintiff’s allegations did not state a claim for relief. Dkt. 38 at 7-14. However, the Court granted Plaintiff an opportunity to amend her claims relating to the following: Due Process, Equal Protection, and Ex Post Facto Clauses. *Id.* at 14. Meanwhile, Plaintiff had also raised an Eighth Amendment claim based on the denial of her RRC transfer request and a First Amendment claim that such a denial was the result of retaliation due to her previous lawsuits, but the Court dismissed both claims with prejudice and without leave to amend in its August 15, 2017 Order. *Id.* at 8-9, 13-14.

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¹ Some RRCs are colloquially known as halfway houses.

1 Plaintiff then filed her second amended complaint (“SAC”) in which she named Defendant
2 Randy L. Tews (hereinafter “Defendant”), who is the warden at FCI-Dublin. Dkt. 48 at 2.²
3 Plaintiff sought monetary damages. *Id.* at 20. On July 10, 2018, the Court issued its service order
4 and served the SAC on Defendant. Dkt. 50.

5 In an Order dated March 28, 2019, the Court granted Defendant’s dispositive motion on
6 the claims in the SAC relating to the Due Process, Equal Protection, and Ex Post Facto Clauses,
7 which was treated as one for summary judgment. Dkt. 65. Plaintiff appealed. Dkt. 67.

8 On appeal, the Ninth Circuit, in an opinion filed July 20, 2020, affirmed the Court’s ruling
9 on the claims relating to the Due Process, Equal Protection, and Ex Post Facto Clauses as well as
10 on the dismissal of the deliberate indifference and retaliation claims, but reversed and remanded as
11 to the denial of leave to amend the deliberate indifference claim. *See* Dkt. 69, *Jiau v. Tews*, No.
12 19-15825, slip op. at 4 (9th Cir. July 20, 2020). Specifically, the Ninth Circuit found “the district
13 court abused its discretion by denying [Plaintiff] leave to amend her deliberate indifference claim
14 because it is not absolutely clear that the claim cannot be cured by amendment.” *Id.* (citing *Akhtar*
15 *v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (“A district court should not dismiss a *pro se*
16 complaint without leave to amend unless it is absolutely clear that the deficiencies of the
17 complaint could not be cured by amendment.”)). The mandate issued on September 11, 2020.
18 Dkt. 70.

19 In an Order dated October 6, 2020, the Court reopened this action and granted Plaintiff
20 leave to amend the Eighth Amendment deliberate indifference claim in a third amended complaint
21 (“TAC”). Dkt. 71 at 3. The Court explained to Plaintiff that her amended deliberate indifference
22 claim could not rest on her previous allegations that she did not obtain the RRC transfer she
23 sought. *Id.* The Court also provided background and analysis from its August 15, 2017 Order, in
24 which it explained the requirements for a cognizable violation of the Eighth Amendment claim.

27 ² Page number citations refer to those assigned by the Court’s electronic case management
28 filing system and not those assigned by Plaintiff.

1 Id. It further set forth its earlier finding, stating as follows:

2 Plaintiff does not allege that she was denied the minimal, civilized
3 measure of life's necessities. Nor does she provide evidence of
4 deprivations of any of the aforementioned categories. Rather, she
5 complains of being denied a particular prison transfer. Plaintiff
6 cannot state an Eighth Amendment claim on these grounds, because
7 the deprivation complained of is not sufficiently extreme.

8 Id. Finally, the Court cautioned Plaintiff that a failure to file a TAC that corrects the previously-
9 found deficiency would result in a dismissal without prejudice. *Id.* at 4.

10 Thereafter, Plaintiff filed her TAC. Dkt. 72.

11 Defendant has filed a motion to dismiss the TAC on the following grounds: (1) a Federal
12 Rule of Civil Procedure ("FRCP") 12(b)(1) dismissal because the Court lacks subject matter
13 jurisdiction over Plaintiff's claim; and (2) a FRCP 12(b)(6) dismissal because Plaintiff fails to
14 state a plausible claim of relief under *Bivens* and the Eighth Amendment; and (3) qualified
15 immunity. Dkt. 73. Plaintiff has opposed the motion to dismiss, and Defendant has filed a reply.
16 Dkts. 77, 78. Plaintiff has also filed an unsolicited sur-reply. Dkt. 79. In addition, Plaintiff has
17 filed a "Motion to Strike Defendant's Motion to Dismiss as Untimely." Dkt. 74. Defendant has
18 opposed the motion to strike, and Plaintiff has filed a reply. Dkts. 75, 76.

19 For the reasons outlined below, the Court reviews the TAC and finds cognizable Plaintiff's
20 amended Eighth Amendment claim, and it DENIES Defendants' motion to dismiss without
21 prejudice to filing a motion for summary judgment, as well as DENIES as moot Plaintiff's motion
22 to strike.

23 **II. BACKGROUND**

24 Because this action involves the alleged denial of Plaintiff's request to be transferred to an
25 RRC, the Court includes this brief background from on the authority of the BOP to place an
26 inmate in an RRC from its July 10, 2018 Order, which states as follows:

27 The BOP has the authority, under 18 U.S.C. § 3[62]1(b), to designate
28 the location of an inmate's imprisonment. 18 U.S.C. § 3[62]1(b).
29 Prior to December 13, 2002, the BOP's policy was to exercise its
30 discretion in allowing prisoners to serve part or all of their
31 imprisonment in an RRC. *Rodriguez v. Smith*, 541 F.3d 1180, 1182

(9th Cir. 2008). As of December 13, 2002, the Department of Justice Office of Legal Counsel ended that practice by issuing a legal opinion that section 3621(b) does not authorize inmate placement in an RRC for an entire term, for the reason that such placement does not constitute imprisonment. *Id.* In the light of the above-referenced opinion, the BOP, on December 20, 2002, changed its policy, by limiting an inmate's eligibility for placement in an RRC to the shorter of either six months or the final ten percent of the inmate's sentence. *Id.* Subsequently, that policy was invalidated by the First and Eighth Circuits, which found the policy failed to recognize the BOP's discretion to transfer inmates at any time to an RRC. *Id.* In response, the BOP decided to "exercise its discretion categorically to limit inmates' community confinement to the last ten percent of the prison sentence being served, not to exceed six months." *Id.* (quoting 69 Fed. Reg. 51213). In 2005, that BOP rule was codified at 28 C.F.R. §§ 570.20 and 570.21. *Id.*

On April 9, 2008, the Second Chance Act was signed into law, authorizing the BOP to consider placing inmates in an RRC for up to the final twelve months of their sentence. 18 U.S.C. § 3624. On September 4, 2008, the Ninth Circuit decided *Rodriguez*, *see supra*, holding the rules published by the BOP at 28 C.F.R. §§ 570.20 and 570.21 conflicted with the Congressional intent of 18 U.S.C. § 3621(b), which sets forth five factors the BOP must consider when making placement and transfer decisions. *See Rodriguez*, 541 F.3d at 1186. As determined by the Ninth Circuit, inmates must be considered for RRC placement based on the five factors of section 3621(b) and consequently, the BOP cannot reference 28 C.F.R. §§ 570.20 and 570.21 in considering an inmate for RRC placement. *Id.* at 1189.

Plaintiff claims that "[o]n or about October 4, 2011, [she] was sentenced to a forty eight-month term of incarceration for the offense of security fraud." Dkt. 48 at 3. On December 19, 2011, she arrived at FCI-Dublin to complete her sentence. *Id.* Plaintiff claims that in August 2012, she was "classified by the [BOP] Central Monitoring Case ("CMC") as 'community custody.'" *Id.*

Plaintiff claims that, according to the Second Chance Act, she would have become eligible for up to twelve-month pre-release placement in an RRC. *Id.* Plaintiff claims that she believed her eligibility to serve her sentence in an RRC started on or about June 2013. *Id.* Thus, Plaintiff sought to be transferred to an RRC on or about December 2012. *Id.* She claims that on December 3, 2012, her request to be transferred to an RRC "was denied within [Defendant's] authority." *Id.* at 3, 5.

Dkt. 50 at 2-4 (brackets added).

The Court also includes the complete background and analysis relating to the deliberate indifference claim at issue from its August 15, 2017 Order, which states as follows:

1 The Eighth Amendment protects prisoners from inhumane methods
2 of punishment and conditions of confinement. *See Morgan v.*
3 *Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006). Extreme
4 deprivations are required to make out a conditions-of-confinement
5 claim, and only those deprivations denying the minimal, civilized
6 measure of life's necessities are sufficiently grave to form the basis
7 of an Eighth Amendment violation. *Hudson v. McMillian*, 503 U.S.
8 1, 9 (1992) (citations and quotations omitted).

9 A prison official violates the Eighth Amendment when two
10 requirements are met: (1) the deprivation alleged must be, objectively,
11 sufficiently serious, *see Farmer v. Brennan*, 511 U.S. 825, 834 (9th
12 Cir. 1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)); and
13 (2) the prison official must possess a sufficiently culpable state of
14 mind, *see id.* (citing *Wilson*, 501 U.S. at 297). In prison-conditions
15 cases, the necessary state of mind is one of "deliberate indifference,"
16 i.e., the official knows of and disregards an excessive risk to inmate
17 health or safety. *See Farmer*, 511 U.S. at 834, 837. The official must
18 be aware of facts from which the inference could be drawn that a
19 substantial risk of serious harm exists, and he also must draw the
20 inference. *See id.* at 837. In determining whether the objective
21 component has been met, the Court must focus on discrete and
22 essential human needs such as health, safety, food, and warmth. *See*
23 *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). Courts may not find
24 Eighth Amendment violations based on the "totality of conditions" at
25 a prison, but instead should require evidence of specific conditions
26 amounting deprivations of essential food, medical care, sanitation,
abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472, 481-
84 (1995).

27 Here, Plaintiff does not allege that she was denied the minimal,
28 civilized measure of life's necessities. Nor does she provide evidence
of deprivations of any of the aforementioned categories. Rather, she
complains of being denied a particular prison transfer. Plaintiff
cannot state an Eighth Amendment claim on these grounds, because
the deprivation complained of is not sufficiently extreme. *Cf. Olim v.*
Wakinekona, 461 U.S. 238, 244-48 (1983) (Prisoners have no
constitutional right to incarceration in a particular institution.); *see also* *Tyler v. Coggins*, 2012 WL 285023, *2 (E.D. Cal. Jan. 31, 2012)
(finding denial of requested RRC transfer did not constitute
sufficiently serious deprivation to satisfy first element of Eighth
Amendment claim); *Seidenfeld v. Rosales*, 2011 WL 835782, *2
(C.D. Cal. Jan. 20, 2011) (finding denial of entry into RDAP did not
amount to adequate deprivation with regard to Eighth Amendment
claim).

27 Accordingly, Plaintiff's Eighth Amendment claim is DISMISSED
28 WITH PREJUDICE, because refusing a requested RRC transfer
cannot constitute a serious deprivation sufficient to satisfy the first
element of Plaintiff's Eighth Amendment claim.

As explained above, in its Order dated October 6, 2020, the Court directed Plaintiff to file her TAC “in which she may amend only her deliberate indifference claim, if she can correct the deficiencies as set forth above.” Dkt. 71 at 3.

As mentioned above, in her TAC, Plaintiff raises her amended deliberate indifference claim, which is the only remaining claim in this action. *See* Dkt. 72 at 5, 9-14.

III. DISCUSSION

A. Review of TAC

1. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” *Id.* § 1915A(b). *Pro se* pleadings must be liberally construed, however. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

To state a claim under *Bivens* and its progeny, a plaintiff must allege: (1) that a right secured by the Constitution of the United States was violated, and (2) that the alleged violation was committed by a federal actor. *See Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991) (42 U.S.C. § 1983 and *Bivens* actions are identical save for replacement of state actor under section 1983 by federal actor under *Bivens*).

2. Analysis of Legal Claim from TAC

In her TAC, Plaintiff reasserts certain allegations from her SAC regarding her RRC placement decision, which began on December 3, 2012 with the first denial of her RRC placement request “without specific reason.” *See* Dkt. 72 at 5, 11. On December 7, 2012, April 16, 2013 and April 18, 2013, she submitted requests for the reasons of the denial. *Id.* at 5. On May 15, 2013, Plaintiff was informed that she was denied RRC placement based on her failure to complete the

1 Residential Drug Abuse Treatment Program (“RDAP”) and her refusal to participate in the Inmate
2 Financial Responsibility Program (“IFRP”). *Id.* While she was “classified as ‘low change for
3 recidivism,’ she believes that Defendant “supervised others conducting RRC determination by
4 creating false information and falsified recidivism risk level to exclude her from getting [the] 12-
5 month RRC placement.” *Id.* She specifically alleges that her refusal to participate in the IFRP,
6 *see id.* at 8-9 (quoting Pl.’s Ex. 7), was wrongly factored into her RRC placement and that
7 Defendant violated the Equal Protection Clause because other female inmates were allegedly
8 treated differently than Plaintiff, *see id.* at 6-8.

9 Meanwhile, Plaintiff’s new allegations relating to her Eighth Amendment deliberate
10 indifference claim focus on her alleged cardiac condition while incarcerated and Defendant’s
11 “den[ial] of her eligibility to be released to a RRC to access necessary cardiac treatments.” *Id.* at
12 5, 9-14. She alleges that a few months before her first RRC placement denial, “[o]n or about
13 August 21, 2012, [her] heart failed.” *Id.* at 9. She adds that she “suffered from worsening cardiac
14 problem[s] and serious depression as her heart had failed on August 21, 2012 . . . [and she] was
15 sent to hospital’s emergency room [sic] by ambulance from the prison.” *Id.* at 5; *see also id.* at 9-
16 10. She further states that her “cardiac problems worsened without necessary medical attention
17 since her emergency visit,” and that Defendant “acted with deliberate indifference to [Plaintiff’s]
18 medical needs . . . [because] she was not taken to a cardiologist to proceed with a needed catheter
19 ablation³.” *Id.* at 9 (footnote added). Plaintiff alleges that following her emergency room visit, the
20 “prison nurse prescribed her Diltiazem medication,” which was the “wrong medication for [her]
21 heart condition.” *Id.*; *see also id.* at 14. Plaintiff states that she was “simply left untreated or had
22 more than a year delay while she suffered from continual and ongoing pain and advancing
23 physical deterioration.” *Id.* at 9. On July 22, 2013, prison medical staff approved her cardiology

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26 ³ Catheter ablation is a way to treat irregular heartbeats by destroying the tissue causing
27 irregular heartbeats and creating scar tissue inside the heart, which will help the heartbeat stay in
rhythm. *See* <https://www.webmd.com/heart-disease/atrial-fibrillation/catheter-ablation-afib-atrial-fibrillation> (last visited June 16, 2021).

1 consultation request. *See id.* at 9-10 (citing Pl.’s Ex. 3). Plaintiff claims that the approval for the
2 cardiology consult was “pushed out by Defendant.” *Id.* at 10; *see also id.* at 12-13. Plaintiff
3 further alleges that Defendant allowed other inmates with other medical conditions to be placed in
4 RRCs before Plaintiff. *See id.* According to Plaintiff, if Defendant had done a proper RRC
5 analysis, she “would have arrived earlier at the RRC to receive proper treatment for her heart
6 condition.” *Id.* at 11; *see also id.* at 13. Plaintiff further alleges Defendant’s deliberate
7 indifference was evident from the “Warden’s office[’s]” August 2013 decision to “force[]
8 [Plaintiff]” to do a janitorial job five days a week. *Id.* at 12. After “the army supervisor dismissed
9 [Plaintiff] due to her critical heart condition and requested her to do a job change,” the “Warden’s
10 office punished [Plaintiff] with two disciplinary charges.” *Id.*; *see also id.* at 13-14. Plaintiff
11 alleges that all of Defendant’s actions were done in “bad faith,” with “reckless disregard for a
12 likelihood of harm,” and in an “oppressive” fashion. *Id.* at 14.

13 Liberally construed, the Court finds that Plaintiff’s new allegations in her TAC state a
14 cognizable Eighth Amendment claim of deliberate indifference against Defendant. *See id.* at 5, 9-
15 14.

16 **B. Defendant’s Motion to Dismiss**

17 **1. Legal Standard**

18 Under FRCP 12(b)(6), a district court must dismiss a complaint if it fails to state a claim
19 upon which relief can be granted. To survive a FRCP 12(b)(6) motion to dismiss, the plaintiff
20 must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v.*
21 *Twombly*, 550 U.S. 544, 556 (2007). A claim is facially plausible when the plaintiff pleads facts
22 that “allow[] the court to draw the reasonable inference that the defendant is liable for the
23 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must
24 be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* While courts do not
25 require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a
26 right to relief above the speculative level.” *Twombly*, 550 U.S. at 555, 570.

1 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the Court
2 accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the
3 plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is
4 not required to accept as true "allegations that are merely conclusory, unwarranted deductions of
5 fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
6 2008).

7 **2. Analysis**

8 As mentioned, Defendant raises the following challenges to the TAC: (a) the Court lacks
9 of subject matter jurisdiction over the Eighth Amendment claim because (1) Plaintiff has not
10 exhausted her administrative remedies or, alternatively, (2) her claim is predicated on a contention
11 that her RRC determination is improper; (b) Plaintiff's *Bivens* claim should be dismissed under
12 FRCP 12(b)(6) because she has not and cannot plausibly state a claim for relief because (1) *Ziglar*
13 *v. Abbasi*⁴ does not permit Plaintiff's claim; or (2) Plaintiff has not and cannot raise a cognizable
14 *Bivens* claim; and, lastly, (c) Defendant is entitled to qualified immunity for the conduct alleged.
15 Each of these arguments shall be addressed below in turn.

16 **a. Subject Matter Jurisdiction**

17 **1) Based on Exhaustion of Administrative Remedies**

18 Title 42 U.S.C. § 1997e provides that "[n]o action shall be brought with respect to prison
19 conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,
20 prison, or other correctional facility until such administrative remedies as are available are
21 exhausted." 42 U.S.C. § 1997e(a). Under this section, an action must be dismissed unless the
22 prisoner exhausted his or her available administrative remedies before he or she filed suit. *See*
23 *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002). The exhaustion requirement "applies to
24 all inmate suits about prison life, whether they involve general circumstances or particular
25 episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 122 S.

27 ⁴ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017).
28

1 Ct. 983, 992 (2002). Exhaustion of all “available” remedies is mandatory; those remedies need
2 not meet federal standards, nor must they be “plain, speedy, and effective.” *Id.* at 988. The
3 purposes of the exhaustion requirement include allowing the prison to take responsive action,
4 filtering out frivolous cases, and creating an administrative record. *See id.*

5 The Court notes that under the law of the circuit, in the rare event that a failure to exhaust
6 is clear on the face of the complaint, Defendant may move for dismissal under FRCP 12(b)(6) as
7 opposed to the previous practice of moving under an unenumerated FRCP 12(b) motion. *Albino v.*
8 *Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (*overruling Wyatt v. Terhune*, 315 F.3d 1108, 1119
9 (9th Cir. 2003), which held that failure to exhaust available administrative remedies under Prison
10 Litigation Reform Act, 42 U.S.C. § 1997e(a), should be raised by defendant as unenumerated
11 FRCP 12(b) motion). Otherwise if a failure to exhaust is not clear on the face of the complaint,
12 Defendant must produce evidence proving failure to exhaust in a motion for summary judgment
13 under FRCP 56. *Id.* If undisputed evidence viewed in the light most favorable to Plaintiff shows
14 a failure to exhaust, Defendant is entitled to summary judgment under FRCP 56. *Id.* But if
15 material facts are disputed, summary judgment should be denied, and the district judge rather than
16 a jury should determine the facts in a preliminary proceeding. *Id.* at 1168.

17 Here, Defendant has filed a motion to dismiss under FRCP 12(b) on grounds that Plaintiff
18 failed to exhaust her administrative remedies (*see* Dkt. 73), among other grounds, but the Court
19 finds that such grounds for dismissal are more properly raised in a motion for summary judgment.
20 For example, Defendant argues that “although Plaintiff filed 14 administrative complaints while in
21 BOP custody, she failed to present any issue related to improper or untimely medical care.” *Id.* at
22 19 (citing Vickers Decl. ¶ 4). However, in support of their argument, Defendant relies on a
23 declaration from Paralegal Specialist Jennifer Vickers, who claims that she reviewed the
24 aforementioned 14 administrative complaints and concludes that “none of [Plaintiff’s]
25 administrative remedies concerned allegations of inappropriate medical care or delayed treatment
26 while in federal custody.” Vickers Decl. ¶ 4. Ms. Vickers claims that she is “familiar with and
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1 have access to BOP’s various record-keeping systems, such as SENTRY, which is a database with
2 inmate information about inmate discipline, sentence computation, and administrative remedy
3 filings.” *Id.*, ¶ 1. Nowhere does it indicate that Ms. Vickers’s duties include direct handling or
4 processing of administrative complaints, however. *See* Vickers Decl. ¶ 1. It seems that she
5 “routinely obtain[s] and provide[s] BOP records for the U.S. Attorney’s Office when requested to
6 do so to assist with litigation filed against the BOP.” *Id.* Attached to Ms. Vickers’s declaration is
7 a one-page list of Plaintiff’s 14 administrative complaints. Vickers Decl., Ex. 1. The record does
8 not include copies of these administrative complaints. *See id.* And without a more complete
9 record, the Court cannot determine whether Plaintiff has failed to exhaust her administrative
10 remedies. Therefore, the motion to dismiss as to this ground is DENIED without prejudice.
11 Pursuant to the briefing schedule outlined below, Defendant may renew the arguments in support
12 of dismissal (including the aforementioned arguments relating to Plaintiff’s failure to exhaust her
13 administrative remedies) by way of a motion for summary judgment, in light of the Ninth Circuit’s
14 recent ruling in *Albino*.
15

16 **2) Based on Plaintiff’s Claim for Deliberate Indifference as a Challenge
to Her RRC Placement**

17 Alternatively, Defendant argues that “[t]o the extent Plaintiff’s claim for deliberate
18 indifference is understood as a challenge to her RRC placement, this Court, additionally, and
19 alternatively, lacks subject matter jurisdiction.” Dkt. 73 at 19. The Court made such a finding in
20 its August 15, 2017 Order when it initially dismissed Plaintiff’s Eighth Amendment claim because
21 “refusing a requested RRC transfer cannot constitute a serious deprivation sufficient to satisfy the
22 first element of Plaintiff’s Eighth Amendment claim.” Dkt. 38 at 9. However, as explained
23 above, Plaintiff was eventually allowed to amend her Eighth Amendment claim, and she now
24 alleges that she suffered heart problems which were left untreated during the time Defendant
25 denied her requested RRC transfer, and that Defendant’s actions were done in “bad faith,” with
26 “reckless disregard for a likelihood of harm,” and in an “oppressive” fashion. Dkt. 72 at 14.
27 Thus, as the Court found above, the TAC sufficiently alleges a cognizable claim that Defendant
28

1 actions were deliberately indifferent to Plaintiff's serious medical needs. Therefore, the Court
2 DENIES Defendant's aforementioned alternative argument in their motion to dismiss on the
3 ground that the Court lacks subject matter jurisdiction over her Eighth Amendment claim.
4

5 **b. *Bivens* Claim**

6 Next, Defendant argues that even if this Court believes it has jurisdiction, Plaintiff's *Bivens*
7 claim is properly dismissed under FRCP 12(b)(6) because Plaintiff has not and cannot plausibly
8 state a claim for relief. Dkt. 73 at 20-32.

9 **1) Plaintiff's Claim Does Not Fall Under a New *Bivens* Context**

10 The Supreme Court has held on three occasions that, even absent statutory authority, a
11 private right of action for damages may be implied from the Constitution itself for constitutional
12 violations by federal employees or their agents. *See Bivens*, 403 U.S. at 392-97 (Fourth
13 Amendment unreasonable search and seizure); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979)
14 (Fifth Amendment Due Process Clause gender discrimination); *Carlson v. Green*, 446 U.S. 14, 17-
15 19 (1980) (Eighth Amendment inadequate medical treatment). But “[t]hese three cases—*Bivens*,
16 *Davis*, and *Carlson*—represent the only instances in which the [Supreme] Court has approved of
17 an implied damages remedy under the Constitution itself.” *Ziglar v. Abbasi*, 137 S. Ct. 1843,
18 1855 (2017). The Court has made clear that “expanding the *Bivens* remedy is now a ‘disfavored’
19 judicial activity,” *id.* at 1857 (citation omitted), and will not be available if there are “‘special
20 factors’ counselling hesitation in the absence of affirmative action by Congress,” *id.* at 1848
21 (citation omitted). The Court has emphasized that “for almost 40 years, we have consistently
22 rebuffed requests to add to the claims allowed under *Bivens*.” *Hernandez v. Mesa*, 140 S. Ct. 735,
23 743 (2020). Courts are to engage in the following analysis when presented with plaintiffs seeking
24 to proceed under *Bivens*: “First, courts must determine whether the plaintiff is seeking a *Bivens*
25 remedy in a new context. If the answer to this question is no, then no further analysis is required.
26 If the answer is yes, then the court must determine whether special factors counsel[] hesitation.”
27 *Lanuza v. Love*, 899 F.3d 1019, 1023 (9th Cir. 2018) (internal quotation marks, formatting, and

1 citations omitted).

2 Here, the parties first dispute whether Plaintiff's Eighth Amendment claim presents a new
3 context under *Abbasi*. Defendant argues that Plaintiff's Eighth Amendment claims are "distinct
4 from those in *Carlson* whether the care received in a critical health emergency led to the plaintiff's
5 death." Dkt. 73 at 22. Meanwhile, Plaintiff claims that "Defendant misunderstands both *Abbasi*
6 and [her] claim" and that "[her] amended complaint is nothing but deliberate indifferent to a
7 prisoner's serious medical needs in violation of the Eighth Amendment." Dkt. 77 at 3.

8 As noted above, in 1980 the Supreme Court recognized a *Bivens* damages remedy for
9 Eighth Amendment inadequate medical treatment claims, which is the essence of Plaintiff's claim
10 in the instant matter. *See Carlson*, 446 U.S. at 17-19. Therefore, Plaintiff's claim for an Eighth
11 Amendment violation does not fall under a new *Bivens* context. Accordingly, the Court need not
12 proceed to the special factors analysis under *Abbasi*. *See Lanuza*, 899 F.3d at 1023. Therefore,
13 the Court DENIES the motion to dismiss on the ground that *Abbasi* does not permit Plaintiff's
14 claim.

15 2) Sufficiency of the Pleadings

16 As explained above, to state a claim under *Bivens* and its progeny, a plaintiff must allege:
17 (1) that a right secured by the Constitution of the United States was violated, and (2) that the
18 alleged violation was committed by a federal actor. *See Van Strum*, 940 F.2d at 409. With respect
19 to supervisory liability, "[a]bsent vicarious liability, each Government official, his or her title
20 notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 677 (finding
21 under *Twombly* and Rule 8 of the Federal Rules of Civil Procedure, that complainant-detainee in a
22 *Bivens* action failed to plead sufficient facts "plausibly showing" that top federal officials
23 "purposely adopted a policy of classifying post-September-11 detainees as 'of high interest'
24 because of their race, religion, or national origin" over more likely and non-discriminatory
25 explanations). *Bivens* liability requires proof of direct personal responsibility. *See Pellegrino v.*
26 *United States*, 73 F.3d 934, 936 (9th Cir. 1996). A theory of respondent superior is not applicable

1 in a *Bivens* action. *See id.*; *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991). *Bivens*
2 liability may be imposed, however, when a supervisor participated or acquiesced in the alleged
3 constitutional deprivations. *See Jasinski v. Adams*, 781 F.2d 843, 848 (11th Cir. 1986).

4 The Eighth Amendment protects prisoners from inhumane conditions of confinement.
5 *Farmer*, 511 U.S. at 832. In order to prevail on an Eighth Amendment claim for inadequate
6 medical care, a plaintiff must show “deliberate indifference” to his or her “serious medical needs.”
7 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). “This includes ‘both an objective standard—that the
8 deprivation was serious enough to constitute cruel and unusual punishment—and a subjective
9 standard—deliberate indifference.’” *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014)
10 (citation omitted). To meet the objective element of the standard, a plaintiff must demonstrate the
11 existence of a serious medical need. *Estelle*, 429 U.S. at 104. To satisfy the subjective element,
12 the plaintiff must show that “the official knows of and disregards an excessive risk to inmate
13 health or safety; the official must both be aware of facts from which the inference could be drawn
14 that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer*, 511
15 U.S. at 837. Thus, the official must have a “sufficiently culpable state of mind,” *id.* at 834, and it
16 is not enough to show that an official should have identified a risk if he in fact did not, *see id.* at
17 837-38; *see also id.* at 844 (“[I]t remains open to the officials to prove that they were unaware
18 even of an obvious risk to inmate health or safety.”).

19 There is no question that it is clearly established that deliberate indifference to a prisoner’s
20 serious medical needs violates the Eighth Amendment’s proscription against cruel and unusual
21 punishment, *see Estelle*, 429 U.S. at 104, and Defendant does not argue otherwise, *see* Dkt. 73 at
22 27-32. Instead, Defendant asserts that the TAC fails to include sufficient non-conclusory
23 allegations that Defendant’s actions in his individual capacity led to Plaintiff’s alleged harm. *Id.*
24 at 29. Meanwhile, Plaintiff counters that her allegations show that Defendant “had knowledge of
25 [Plaintiff’s] illness and showed deliberate indifference to [her] serious medical needs” when
26 “Defendant canceled her cardiologist appointment, forced her to a new job assignment posing a
27

1 great risk to a cardiovascular disease patient.” Dkt. 77 at 4. Plaintiff adds that “Defendant further
2 punished [Plaintiff] with two disciplinary charges when [she] reported her heart condition to her
3 supervisor on duty, and that Defendant “also denied her early release request pursuant to 18
4 U.S.C. § 3624(c) . . . [and] denying her the length of time she needed at a RRC to seek medical
5 help.” *Id.* at 4-5 (citing Pl.’s Ex. 1). Again, as the Court has already found above, these
6 allegations state a cognizable claim for deliberate indifference in violation of the Eighth
7 Amendment. Defendant’s contrary arguments are unpersuasive, particularly at the pleading stage.
8 Therefore, at this time, Plaintiff has alleged enough for her case to proceed, and the Court
9 DENIES Defendant’s motion to dismiss on the ground that Plaintiff has failed to raise a
10 cognizable *Bivens* claim.

11 **c. Qualified Immunity**

12 Federal officials are entitled to a qualified immunity defense whether they are facing
13 claims under *Bivens* or Section 1983. *See Johnson v. Fankell*, 520 U.S. 911, 914-15 (1997). “The
14 doctrine of qualified immunity protects government officials from liability for civil damages
15 insofar as their conduct does not violate clearly established statutory or constitutional rights of
16 which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)
17 (internal quotation marks and citation omitted); *see Harlow v. Fitzgerald*, 457 U.S. 800, 818
18 (1982). Qualified immunity is particularly amenable to summary judgment adjudication. *Martin*
19 *v. City of Oceanside*, 360 F.3d 1078, 1081 (9th Cir. 2004).

20 To determine whether an official is qualifiedly immune from suit, courts engage in the
21 two-step analysis set forth in *Saucier v. Katz*, 533 U.S. 194, 201 (2001). *See Pearson*, 555 U.S. at
22 236 (determining that the sequence set forth in *Saucier* is not mandatory and that courts can
23 exercise their discretion to proceed in the order appropriate for a particular case). The first, but no
24 longer threshold, question is, “Taken in the light most favorable to the party asserting the injury,
25 do the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier*, 533 U.S.
26 at 201; *see Pearson*, 555 U.S. at 236. If the answer is no, the inquiry ends. *Id.* The second

1 question is “whether the right was clearly established,” an analysis that “must be undertaken in
2 light of the specific context of the case, not as a broad general proposition.” *Id.* “[T]he relevant,
3 dispositive inquiry in determining whether a right is clearly established is whether it would be
4 clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Estate*
5 *of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050 (9th Cir. 2002) (internal quotation marks and
6 citation omitted).

7 Here, Plaintiff has adequately alleged a cognizable Eighth Amendment claim against
8 Defendant. During the time period of the alleged acts, it was clearly established that deliberate
9 indifference to a prisoner’s serious medical needs violates the Eighth Amendment’s proscription
10 against cruel and unusual punishment. *See Estelle*, 429 U.S. at 104. The question, however, of
11 whether any of Defendant could reasonably have believed that his conduct was lawful is more
12 properly resolved on a motion for summary judgment, when Defendant is entitled to present
13 evidence on his behalf and the Court may properly consider such evidence. *See, e.g., Morley v.*
14 *Walker*, 175 F.3d 756, 761 (9th Cir. 1999) (affirming the district court’s denial of a dismissal
15 motion on grounds of qualified immunity because the court’s review is confined only to the
16 contents of the complaint). Thus, for the purposes of the instant motion, the Court cannot resolve
17 the issue of whether Defendant is entitled to qualified immunity as to Plaintiff’s claim at the
18 pleading stage. Therefore, the Court DENIES Defendant’s motion to dismiss on the ground that
19 he is entitled to qualified immunity.

20 **IV. CONCLUSION**

21 For the foregoing reasons, the Court orders as follows:

22 1. The Court finds Plaintiff’s allegations in her TAC state a cognizable Eighth
23 Amendment deliberate indifference claim.

24 2. Defendant’s motion to dismiss is DENIED without prejudice. Dkt. 73. Defendant
25 may file a motion for summary judgment, if appropriate, **which addresses the Court’s concerns**
26 **above, including supporting any exhaustion arguments with copies of Plaintiff’s grievances**

1 and a declaration from an individual who handles and processes grievances at the prison, or
2 he may file a motion for summary judgment on the merits, as set forth below.
3

4 a. No later than **twenty-eight (28) days** from the date of this Order, Defendant
5 may renew the arguments in support of dismissal by way of a motion for summary judgment.
6

7 b. Plaintiff shall file any opposition to the aforementioned Defendant's motion
8 within **twenty-eight (28) days** of the date the motion is filed.
9

10 c. Defendant shall file a reply within **fourteen (14) days** of the date the
11 opposition is filed. The motion shall be deemed submitted as of the date the reply brief is due. No
12 hearing will be held on the motion unless the Court so orders at a later date.
13

14 Defendant is reminded that a motion for summary judgment also must be accompanied by
15 a *Rand*⁵ notice so that Plaintiff will have fair, timely and adequate notice of what is required of her
16 in order to oppose the motion. *Woods v. Carey*, 684 F.3d 934, 939 (9th Cir. 2012) (notice
17 requirement set out in *Rand* must be served concurrently with motion for summary judgment).
18

19 3. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
20 informed of any change of address and must comply with the Court's orders in a timely fashion.
21 Pursuant to Northern District Local Rule 3-11 a party proceeding *pro se* whose address changes
22 while an action is pending must promptly file a notice of change of address specifying the new
23 address. *See L.R. 3-11(a)*. The Court may dismiss without prejudice a complaint when: (1) mail
24 directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and
25 (2) the Court fails to receive within sixty days of this return a written communication from the *pro*
26 *se* party indicating a current address. *See L.R. 3-11(b)*.
27

28 4. Upon a showing of good cause, requests for a reasonable extension of time will be
29 granted provided they are filed on or before the deadline they seek to extend.
30

31 5. Plaintiff's "Motion to Strike Defendant's Motion to Dismiss as Untimely" is
32 DENIED as moot. Dkt. 74.
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34 5 *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).
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6. This Order terminates Docket Nos. 73 and 74.

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IT IS SO ORDERED.

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Dated: July 12, 2021

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JUDGE YVONNE GONZALEZ ROGERS
United States District Judge

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